(2)

Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-1052

In The

Supreme Court of the United States

VIOLA MEDVED,

Petitioner,

vs.

WORKERS' COMPENSATION APPEAL BOARD (ALBERT GALLATIN SERVICES),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TEMPLETON SMITH, JR., Esquire
PA I.D. #26489
Counsel of Record
HARRY W. ROSENSTEEL, Esquire
PA I.D. #44800

THOMSON, RHODES & COWIE, P.C.
Firm #720
Two Chatham Center, Tenth Floor
Pittsburgh, PA 15219-3499
(412) 232-3400

Counsel for Respondent
Albert Gallatin Services

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a constitutional right to privacy issue was presented to the courts of Pennsylvania and thus appropriately preserved for review by this court?

2. Whether the Petitioner's claim fails to present a valid constitutional issue in the absence of state action?

3. Whether the Petitioner's claim presents a valid constitutional issue in any event?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 8, 9

American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999) 7, 9, 10, 11

Dilkus v. WCAB, 671 A.2d 1135 (Pa., 1996) 8

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 13

Johnson v. Carpenter Technology Corp., 723 F.Supp. 180 (D.Conn. 1989) 11

Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 316 Pa. 240, 532 A.2d 374 (1987) 7, 12, 14

McCusker v. Workmen's Compensation Appeal Board (Rushton Mining Company), 536 Pa. 380, 639 A.2d 776 (1994) 12

Pennsylvania AFL-CIO, et al. v. Commonwealth of Pennsylvania, 563 Pa. 108, 757 A.2d 917 (2000) 7

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 13

Sullivan v. Barnett, 913 F.Supp. 895 (E.D. Pa. 1996) 10

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1998) 10

STATUTES

Pennsylvania Workers' Compensation Act .. 7, 10, 11, 12, 13

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Procedural History

Albert Gallatin Services (hereinafter "Albert Gallatin" or "Employer") filed a petition with the Pennsylvania Bureau of Workers' Compensation seeking to modify or suspend the payment of workers' compensation benefits to its former employee, Viola Medved (hereinafter "Petitioner"), on the basis of her refusal to accept employment involving sedentary work that she was capable of performing. Albert Gallatin alleged that it had located appropriate work for Petitioner through the efforts of a vocational placement expert, but that she had refused to make a good faith effort to secure that work.

The Bureau of Workers' Compensation assigned the Employer's petition to Workers' Compensation Judge Susan Cercone, who held several hearings on the matter. The Employer introduced testimony from Dr. Betsy Blazek-O'Neil concerning the Petitioner's physical capabilities. It also presented testimony from Leonard Felman, a vocational expert, and Stacey Marchione, President of Smart Telecommunications, the entity with whom the Employer had found Petitioner a suitable job. Finally, the Employer submitted documentary evidence concerning a telecommunications job located for Petitioner in August of 1997 with Smart Telecommunications and a handwritten note from the Petitioner, dated August 14, 1997, stating that she did not want the position.

The Petitioner testified on her own behalf. In addition, her husband testified as to his concerns and opinions regarding the proffered job. Petitioner submitted reports

from Dr. Novak and Dr. Blank, as well as a letter she wrote to the Judge outlining her reasons for refusing the position with Smart Telecommunications.

On April 7, 1999, Judge Cercone circulated a decision granting the Employer's Modification Petition but dismissing the Suspension Petition. The Judge found as fact that the Petitioner had degenerative disease in her lumbar spine and that this condition caused her pain, limiting her to sedentary or light duty work. The Judge further found as fact that the proffered job in telecommunications fell within that level of work. Judge Cercone did not find the Petitioner credible when she stated she could not perform the job, mentally or physically. Instead, the Judge accepted as credible the medical testimony of Dr. Blazek-O'Neil on the issue of Petitioner's physical capabilities. The Judge also found credible the testimony offered by the Respondent Employer as to the propriety of the job offered to Petitioner. Therefore, the Judge found that the Employer had met its burden of proving that work within the Petitioner's capabilities had been offered to her and that she had not, in good faith, pursued that job offer.

Petitioner appealed to the Workers' Compensation Appeal Board, which affirmed the decision of the Workers' Compensation Judge.

Petitioner then sought review by the Commonwealth Court of Pennsylvania, arguing (1) that the Workers' Compensation Appeal Board had erred in finding that the Employer had met its burden of proving that work within the Petitioner's physical and mental capabilities had been offered to her; (2) that the Board had erred in failing to find that the job offered to the Petitioner, without offering rent, was a sham; and (3) that the Board had erred in

finding that the Employer had met its burden of proof that work within the Petitioner's physical and mental capabilities was available when Petitioner had testified that she had continuing pain and discomfort.

Petitioner raised no allegations of a violation of a constitutional right to privacy or any other issue arising under the United States Constitution. The Commonwealth Court rejected Petitioner's arguments and affirmed the Board's decision. Petitioner's subsequent Application for Reargument and/or Reconsideration was denied following review by the Court *en banc*.

Petitioner then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which denied the said petition.

The instant Petition for Writ of Certiorari followed.

Factual History

The Petitioner sustained a work-related injury in 1986 when she experienced "a pulling or cracking" in her back which "ran across" her buttocks and into her left leg and foot. (R. 8a)[1] She had been working as a registered nurse at the time. (R. 11a) A "Notice of Compensation Payable" was issued, dated March 10, 1986. (R. 7a)

Almost ten years later, on December 18, 1995, the Petitioner submitted to an independent medical

---

[1] References to the Reproduced Record filed with the Commonwealth Court of Pennsylvania will be made as follows: (R. _a.). References to the Supplemental Reproduced Record filed with the Commonwealth Court of Pennsylvania will be made as follows: (R. _b.).

evaluation by Dr. Betsy Blazek-O'Neil. Based upon her examination of the Petitioner and the history as provided to her by the Petitioner, Dr. Blazek-O'Neil opined that the Petitioner had "degenerative disc disease and degenerative joint disease in her lumbar spine contributed to at least, in part, by the 1986 work injury." She further opined that the Petitioner was capable of sedentary to light forms of work. (R. 97a-98a)

On August 6, 1997, the Petitioner submitted to a vocational interview with Leonard Felman, an employment consultant with Expeditor Corporation. (R. 52a, 55a) Mr. Felman was aware of the physical limitations placed upon the Petitioner by Dr. Blazek-O'Neil. (R. 56a) Given the information he had learned from the vocational interview, and based upon Dr. Blazek-O'Neil's restrictions, Mr. Felman located a suitable job for the Petitioner. (R. 57a)

That job was with Smart Telecommunications, Inc. as a "customer service surveyor in telecommunications." (R. 57a) Mr. Felman sent a letter to the Petitioner informing her of the opportunity with Smart Telecommunications and giving her the parameters of the position, the pay, the hours and the physical requirements. (R. 66a, 20b-24b) Telecommuting, as opposed to telemarketing, is a means by which information is exchanged between businesses. Individuals are not contacted at their residences. No selling is involved. (R. 57a) To enable Petitioner to perform the job, the *public telephone company* (not the Employer) would install a separate telephone line in the Petitioner's home, which would be totally dedicated to her work. (R. 64a) She would then receive a hands-free portable telephone with a headset via UPS, plus lists and information to be used in her work. (R. 64a-65a)

The Petitioner called Mr. Palmer's office to decline the position, stating that if she were to take the position, her husband wanted rent for the use of their property as a commercial establishment. She was told that the job offer was an opportunity to work from her home, for which she would be compensated, but that rent would not be paid. The Petitioner then stated that she did not care for telephone work, did not have the attention span for it, and would not accept the position. (R. 69a)

Stacey Marchione, the President of Smart Telecommunications, confirmed that the proffered position had been accurately described in Mr. Palmer's letter to the Petitioner and that the job was available at the rate of $9.00 per hour, forty hours per week. (R. 6b-12b) Ms. Marchione also testified that Petitioner had not completed the job application sent to her and that, therefore, the interview that had been scheduled for Petitioner had never occurred. (R. 12b)

Both Mr. Palmer and Ms. Marchione testified that no one from Smart Telecommunications would enter the Petitioner's home and that the only time anyone would need to enter her home would be when the *public telephone company* installed a separate telephone line. (R. 64a-65a, 8b-9b)

Mr. Medved, the Petitioner's husband, also testified. He stated that he viewed the proffered job as a total invasion of his privacy and security. (R. 29a) Mr. Medved also expressed the opinion that doing this type of job in their apartment would make his wife nervous, upset, and perhaps unreasonable to get along with, to the detriment of the couple's 45-year marriage. (R. 29a-30a) Mr. Medved, himself, runs seven businesses and is in and out of his

home throughout the course of the day. (R. 31a) Although he agreed that the petitioner could make the requisite calls while he was out on business, he objected to the offer because "they [Employer] didn't want to pay any rent for her space" and questioned the legitimacy of the job. (R. 33a) Mr. Medved also voiced the following concerns about Petitioner's potential employer:

> I feel it's a con . . . they are going to run phone lines through my house. They will know every piece of my apartment. They could plant cameras . . . [or] bugs in my house . . . I say I don't want it in my apartment because they are invading my privacy . . . they don't state when they are going to come. . . . I don't want them in there at all. It's my home. It's not their office. They are not paying rent. I have a storeroom that I will rent to them. (R. 34a-35a)

The Petitioner offered medical reports from Dr. Novak and Dr. Raschella in support of her contention that she was unable to perform the telemarketing position; however, those reports did not include any opinions which conflicted with those of Dr. Blazek-O'Neil. Neither physician commented on the Petitioner's work capacity and neither stated that she was incapable of sedentary to light duty work.

Judge Cercone found, therefore, that Petitioner had not pursued the telecommunications job offer in good faith and granted the Employer's Modification Petition.

In summary, the Judge found that the Employer had established, through the testimony of Dr. Blazek-O'Neil, that the Petitioner had the ability to work in a sedentary to light duty capacity. Through the testimony of Mr. Felman and Ms. Marchione, the Employer established

that the Petitioner had been referred to a position within her physical restrictions which had been open and available. The Petitioner failed to establish that she had acted in good faith in declining the referred employment. Consequently, the Judge modified the Petitioner's benefits in accordance with the applicable standards set forth in *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 316 Pa. 240, 532 A.2d 374 (1987).

The constitutionality of the Pennsylvania Workers' Compensation Act, which is the Act pursuant to which the Petitioner's benefits were modified, was not challenged below. In fact, the Act has recently been held to be constitutional in the cases of *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999) and *Pennsylvania AFL-CIO, et al. v. Commonwealth of Pennsylvania*, 563 Pa. 108, 757 A.2d 917 (2000).

REASONS FOR DENYING THE WRIT

1. Petitioner did not preserve her constitutional claims in the courts below.

The Petition for Writ of Certiorari in this case lists the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution under the heading, "Constitutional Provisions and Statutes Involved." Significantly, however, Petitioner makes no further reference to any of these provisions. Moreover, a review of the record in this case reveals only a passing reference to the Fourth Amendment in a discussion which Petitioner included verbatim in these filings in the court below, and no mention whatsoever of any other constitutional amendment or federal statute. The sole mention of

federal constitutional issues in the court below appears in the following passage, which appears in the Brief for Appellant which Petitioner filed in the Commonwealth Court of Pennsylvania:

> "The Appeal Board cites the case of *Dilkus v. WCAB*, 671 A.2d 1135 (Pa., 1996) for the proposition that partial disability payments may, in part, make up for the expenses associated with transportation to a job. However, neither this case nor any case ever dealt with the enforced conversion of a portion of the claimant's own real estate. Constitutional privacy concerns as well as expressed state tort policy militate against this result. Additionally, not even the government may cross the threshold into a man's private residence without a warrant establishing probable cause as determined by a neutral judicial officer. U.S. Constitution Amendment IV."

Petitioner's "Brief for Petitioner" filed with the Commonwealth Court of Pennsylvania, p. 14; "Petitioner's Application for Reargument and/or Reconsideration" filed with the Commonwealth Court of Pennsylvania, p. 4; "Petition for Allowance of Appeal" filed with the Supreme Court of Pennsylvania, p. 14.

In short, other than the above-cited mention of the Fourth Amendment in connection with warrantless searches, which are not at issue in this case, Petitioner raised no constitutional or other federal issues in the courts below. Like the petitioner in *Adams v. Robertson*, 520 U.S. 83 (1997), the Petitioner in the case at bar has failed to carry her burden of showing that the claims she raises here were properly presented to the court below. Accordingly, under the reasoning set forth by this Court in

Adams, *supra*, her Petition for Writ of Certiorari must be dismissed.

2. Petitioner's claim does not present a valid constitutional issue inasmuch as no state action is involved.

Even if Petitioner had preserved objections to the denial of her workers' compensation benefits based upon the Third, Fourth, Fifth and Ninth Amendments to the United States Constitution in the courts below, such arguments would be devoid of merit and, hence, not proper subjects for review by this Court. In this regard, the protections afforded by the First, Third, Fourth, Fifth, and Ninth Amendments, as applied to the states by the Fourteenth Amendment, apply only to "state action."

The case of *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), cited by petitioner, explains why the actions of Albert Gallatin, a private employer, acting through its workers' compensation insurance carrier, do not constitute "state action" cognizable on constitutional grounds pursuant to the Fourteenth Amendment. In *Sullivan*, this Court held that the acts of a private insurer in exercising its right to request independent utilization review of a claimant's injuries before paying workers' compensation benefits did not constitute "state action."

In so holding, the Court reiterated the following two-pronged test for determining whether a private party's conduct constitutes "state action":

> . . . state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by

> a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."

526 U.S. at 51 (emphasis Court's, citations omitted). The opinion in *Sullivan, supra*, held that the insurer had acted "with the knowledge of and pursuant to" a state statute, thus satisfying the first prong of the above-cited criterion. The Court proceeded to conclude, however, that the insurer did not become a "state actor," and, hence, meet the second prong of the Court's "state action" test, merely by invoking its procedural rights under a state statute. In this regard, the Court cited its prior decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1998) for the proposition that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." (See also, *Sullivan v. Barnett*, 913 F.Supp. 895 (E.D. Pa. 1996), which holds that Pennsylvania workers' compensation insurers are not rendered "state actors" by the fact that the procedural scheme under which they operate is, itself, a product of state legislation.)

Contrary to Petitioner's argument in the instant case, the principles enumerated by the Court in *Sullivan, supra*, mandate the denial of her Petition for Writ of Certiorari. In fact, the relationship between the alleged acts of the Employer and any conceivable "state action" is, if anything, more attenuated in the instant case than it was in *Sullivan, supra*. In that case, the conduct alleged to be "state action" was specifically authorized by an amendment to the Pennsylvania Workers' Compensation Act. In the instant case, the Petitioner neither has cited, nor can cite, any provision of the Pennsylvania Workers' Compensation Act which

either sanctions or prohibits employers from the practice of seeking to discontinue workers' compensation benefits to partially disabled workers who refuse to accept appropriate employment which requires them to work out of their homes. The silence of the Act on this issue clearly indicates "a legislative decision not to interfere in a dispute between an insurer and an employee . . . " (*Sullivan, supra*, at p. 51) over whether that employee has refused employment for which she is reasonably suited.

Like the decision of the insurer in *Sullivan*, the decision of the Employer in the case at bar to seek reduction of the Petitioner's workers' compensation benefits because she refused in-home employment cannot be attributed to the state. Rather, this decision, like that of the insurer in *Sullivan*, " 'turns on . . . judgments made by private parties' without 'standards . . . established by the state.' " *Id.* at 52.

Simply stated, there is no state action in this case. The constitutional right to privacy protects against incursions by the government and persons acting as government agents and has little force against a private employer. *Johnson v. Carpenter Technology Corp.*, 723 F.Supp. 180 (D. Conn. 1989). Here, the action complained of consisted of the installation of a dedicated telephone line in Petitioner's home by the public telephone company. Only the bills for calls made on that telephone line were to be monitored by Smart Telecommunications to determine if the Petitioner was making the calls required of her as a telecommuter. No one from the Employer or Smart Telecommunications would enter the Petitioner's home at any time.

3. Petitioner's claim does not present a valid constitutional issue in any event.

Petitioner argues at length that the job offered to her would have constituted an "invasion of privacy," a "disruption of her quiet home" and a "forced conversion of the use of one's private residence." As such, she is alleging a deprivation of her property rights. The Petitioner, however, fails to recognize that no one has forced her to accept in-home employment. Rather, as set forth above, the Employer has merely exercised its right to seek a reduction of her workers' compensation benefits by the amount she could have been expected to earn from the proffered in-home employment. Hence, what Petitioner is really alleging is a deprivation of workers' compensation benefits. However, Petitioner's "right" to workers' compensation benefits is not a constitutional right, but rather, is an entitlement afforded her by the Pennsylvania Workers' Compensation Act. The constitutional right to privacy applies only to "fundamental rights" and workers' compensation is not such a right. *See e.g., McCusker v. Workmen's Compensation Appeal Board (Rushton Mining Company)*, 536 Pa. 380, 639 A.2d 776 (1994).

The Pennsylvania Workers' Compensation Act and the case law interpreting it, such as *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 532 A.2d 374 (Pa. 1987), clearly require an injured employee to accept the proffered position if it is within his or her physical capabilities. This is a condition of eligibility for workers' compensation benefits under the statute. The only sanction, should the employee elect not to accept the position, is a suspension or modification of his or her workers' compensation benefits. As set forth above, workers' compensation benefits are an *entitlement*, not a *right*.

No one forced the Petitioner to accept the in-home job. In fact, she did not accept it. Her benefits were, therefore, modified in accordance with the Workers' Compensation Act. She was not required to "waive her protected right to the quiet enjoyment of her own residence" or to "waive the rights of her family members to the same entitlement." To the contrary, the Petitioner was offered a job and an opportunity to have gainful employment. She chose to reject the position because she did not like it and because she wanted rent in addition to her wages. Presumably, she also chose to reject the position because her husband objected to it. In any case, by failing to accept the position, she was not seeking to enforce her "right" to privacy, but rather was waiving her "entitlement" to workers' compensation benefits.

In her brief, the Petitioner cites to cases such as *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right to privacy implicated in decision whether or not to terminate a pregnancy), *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy), and other milestone cases involving fundamental rights. These cases are not applicable to the case at hand. No fundamental right is at issue. This case involves merely the Petitioner's entitlement to workers' compensation benefits.

The Pennsylvania Workers' Compensation Act does not seek to regulate home or family, but merely delineates the conditions under which an individual is entitled to workers' compensation benefits. Under Pennsylvania law, an injured employee is not entitled to receive total disability workers' compensation benefits if it is shown that he or she is capable of performing work which is then open and

available. *Kachinski, supra*. Here, the judge found as fact that the Petitioner was physically capable of performing the telecommuter position, a position that was open and available to her should she choose to accept it. The only ramification of her failure to accept it was a modification of her entitlement to workers' compensation benefits. There was no forced intrusion into the Petitioner's privacy.

CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TEMPLETON SMITH, JR., ESQUIRE
PA I.D. #26489
HARRY W. ROSENSTEEL, ESQUIRE
PA I.D. #44800

THOMSON, RHODES & COWIE, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219
(412) 232-3400

Counsel for Respondent
Albert Gallatin Services